GIVEN-NESS AND GIFT: PROPERTY AND THE QUEST FOR ENVIRONMENTAL ETHICS

BY

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Economists and some lawyers argue that environmental degradation results from an absence of property rights, a condition that opens the environment to ill-treatment as a "commons," in which any environmental resource is treated as "just a given". But as Professor Rose points out, conventional forms of property rights can also damage environmental resources, while bureaucratic forms of management can be complex, expensive, and coercive. In this Article, Rose suggests that environmental ethics may yield an alternative or supplemental approach to managing environmental resources, in which the environment is seen not as a "given" but as a "gift." With commons problems in mind, she examines three possible sources for genuinely conservationist environmental ethics: indigenous peoples's practices, biologic rights, and older forms of common property.

I. ENVIRONMENT—A GIVEN OR A GIFT?

This article is about some important ways in which property relates to the environment. The most obvious and noticeable point
is that in many ways, the relationship between property and the environment is one of opposites. Property is about things that are under our control; in fact, having control of something is a way to prove that you own it. Even our ordinary adages make this point: everyone knows the saying, "possession is nine-tenths of the law," meaning that if you control something, the law is very likely to say that you own it.

On the other hand, the word "environment" in ordinary language often designates something that is not under anyone's control at all, something that is a given, or as we often say, "just a given." We talk, for example, about a business environment or a cultural environment: a set of amorphous surroundings that are just "out there," and that we cannot do very much about.

When we talk about "the environment" without any modifiers, we are usually talking about aspects of our physical surroundings, such as air and water. But these physical surroundings, too, are almost by definition "out of control," and hence outside the comfortable range of property. The elements of the unmodified environment are wild things, and the wilderness habitat of wild things, and include the figuratively "wild" resources like underground fluids that our law calls ferae naturae, by analogy to untamed animals on the loose.¹

Historically, we have had quite mixed emotions about this quality of uncontrolled "given-ness." There are many stories and myths about wilderness, for example, and quite a number of these fall into one of two quite striking categories of horror stories. Both categories revolve about the unowned, property-less character of the wild, and about what happens when wild things are transformed into property.

One type of horror story is exemplified by some comments that Jeremy Bentham made in a very forceful argument that prosperity depends on security of property.² For Bentham, the North American wilderness presented a decidedly bleak picture. "The

¹ For ferae naturae applied to animals, see the classic case Pierson v. Post, 3 Cal. R. 175 (N.Y. Sup. Ct. 1805); for analogies to other resources, see Westmoreland & Cambria Natural Gas Co. v. De Witt, 18 A. 724, 725 (Pa. 1889) (groundwater, oil and natural gas analogized to ferae naturae).
² JEREMY BENTHAM, Analysis of the Evils which result from Attacks upon Property, in THE THEORY OF LEGISLATION 70 (Oceana ed. 1975).
interior of that immense region," he wrote, "offers only a frightful solitude, impenetrable forests or sterile plains, stagnant waters and impure vapours; such is the earth when left to itself." He commented on the "fierce tribes" that wandered about in the forests and plains, animated chiefly by the "implacable rivalries" that led them to make constant war on each other: "The beasts of the forests are not so dangerous to man as he is to himself." But Bentham thought that the lands of the settlers, with their secure property, offered a particularly instructive comparison. The settlers had reduced the dangerous and gloomy wildness to property. They enjoyed smiling fields, well-built and populous towns, bustling harbors, and in general presented a picture of "peace and abundance."

Bentham's horror story is thus one in which wilderness is a dark and frightening chaos that becomes sunny and happy only as it vanishes, ceding to property. But there is a counter-horror story too, comprised of many of the narratives we know about the transformation of the wilderness to property. These are stories that begin in innocence and splendor, a pure state that is then subjected to a storm of rampage and heedlessness. Perhaps the most dazzling epiphany of this sort of narrative involved a particularly eerie moment on the Great Plains in the fall of 1883. It was the outset of a buffalo hunting season that, it was thought, would repeat the fabled slaughters of the decade before. But the buffalo hunters, fully outfitted and ready for another riotous orgy of killing, stepped off the train to find only the silence of an empty plain.

We all know both these types of stories at some level and in some version. These archetypical narratives exemplify two different views of wilderness, and indeed two different views of the uncontrolled environment in general. The first story, the one that

3. Id. at 72.
4. Id.
5. Id.
7. Id.
Bentham told, is a vision of the given-ness of nature, and it tells us how deeply problematic that given-ness is. Bentham's story points to the malevolence of those things that are out of control—they are miasmic, shadowy, and filled with sudden violence. This story has a moral too, as many stories do: it tells us that the "given" environment should be reduced to tame and placid property as rapidly as possible.

The second archetypical horror story rests on a vision of the environment that is not just a given, but a gift. Stories of this type are tales of bitter malevolence too, but here the malevolence is the human interaction with the great gifts of nature. It is an interaction that despoils and ravages, that treats with contempt and callousness the things that should be revered, at least in part because they are somehow gifts.

II. ENVIRONMENT AND THE ECONOMICS OF THE COMMONS

Modern economists are in many ways successors to Bentham, generally arguing that the reduction of unowned objects to property is a good thing because property rights bring wealth and peace. Private property regimes identify who has what, so that people can trade things instead of fighting over them. Just as importantly, private property regimes give owners the security that encourages them to invest time and effort in their goods instead of wasting them.

But the modern economists also acknowledge the narratives of despoliation in a way that Bentham did not. Bentham's story moved effortlessly from vicious wilderness to prosperous farms,

8. For narration as a source of moral authority, see David Carr, Time, Narrative and History 156-57 (1986); Hayden White, The Content of the Form: Narrative Discourse and Historical Representation 25 (1987); for narratives of property, see Carol M. Rose, Property as Storytelling: Perspectives From Game Theory, Narrative Theory, Feminist Theory, 2 Yale J.L. & Humanities 37 (1990).


skipping the intermediate stages that ravaged the once-wild landscape. But a number of modern economists have noticed this intermediate stage and have related it to the particular problems of establishing property rights in the things we call “environmental.”

This in-between, transitional stage has to do with the way un-owned things become owned. The normal way to establish property rights in completely unowned things, like seashells or abandoned umbrellas, is simply to take them, and to act as if they are subject to one’s control. A much-used example of the creation of property is the taking of wild animals: the animal is made into property by “reducing it to dominion,” under what is called the Rule of Capture.

But with environmental resources, these normal ways of establishing property rights do not work very well. In fact, they lead to a great deal of destruction, because the goods that we consider environmental usually belong to a kind of natural commons. Environmental resources are difficult to compartmentalize into individual chunks that can be taken without affecting other chunks. In using up air, for example, a factory can scarcely confine the smoke it gives off to a manageable little cube of space; instead, the factory’s smoke may get into the air hundreds of miles away. Even when these resources look as if they can be taken in individual chunks, they may actually be part of some larger-scale renewable stocks, and the continued existence and value of these stocks entails leaving behind (or artificially replenishing) an unused reservoir from which the resource can regenerate. Thus, for example, individual fish may be taken from a fish stock, or individual animals may be taken from a wildlife stock. But in either case, enough must be left behind to repopulate the

11. A modern-day teller of the Bentham story, Harold Demsetz, tracks Bentham in smoothing over this move from the property-less to the propertyed state; see Harold Demsetz, Toward a Theory of Property Rights, 57 AM ECON. REV. 347 (Pap. & Proc. 1967), reprinted in JESSE DUKEMINIER & JAMES KRIER, PROPERTY 42-49 (3d ed. 1993); see also the editors’ critique, id. at 59-62.

12. See Richard Epstein, Possession as the Root of Title, 13 GEORGIA L REV. 1221 (1979); Carol M. Rose, Possession as the Origin of Property, 52 U. CHI. L. REV. 73 (1985).


larger wild stock; otherwise the population will eventually decline or even crash, and future fishers and hunters may not get any at all.\footnote{15} Similarly, but in a more complicated fashion, the multitudinous plants of the Amazon rain forest appear to nourish one another in a complex energy and water exchange that is disrupted by massive burn offs or cuttings, whose impact cannot be easily isolated.\footnote{16}

It is for these reasons that our usual property-defining act, the unregulated rule of capture, turns into a horror story for these great natural commons. These great commons need to be managed as wholes. But because they are so large, no one in particular can acquire them as wholes, and so sometimes no one manages them or reinvests in them at all. Instead, everyone just uses them or takes from them at will. Their great vast wildness seems infinitely exploitable, and puts no bounds on human acquisitiveness. And so sometimes human acquisitiveness itself goes wild: each human actor, fearing to be last in the race to capture the vast wild things, vies with all the others to take while the taking is free.

Through a series of small decisions, the larger environmental resource is wasted, even though it might be in the collective best interest to preserve it. Air gets polluted, fisheries get fished out, forests get felled, bird populations get depleted, and aquifers get pumped dry. In general, people seem to vie to get the most for themselves, while investing the least. All too often, people leave behind a wasteland, where the resources are exhausted to a point that they cannot renew themselves.

From the perspective of any individual, of course, it is entirely sensible to use as much as possible for one's self from common resources: if any one person invests in replenishment, or refrains from polluting, everyone else can take advantage of him or her.


\footnote{16} See Juan De Onis, \textit{The Green Cathedral: Sustainable Development in Brazil} 91-93 (1992).
Nice guys finish last in this logic; what they replenish or leave in place is simply snatched up by someone else. And so it does not make a lot of sense to be nice in the first place. The well-known name for this process, in which everyone takes and no one gives, is the “tragedy of the commons.”\textsuperscript{17} The logic of the “tragedy” is to give everyone what the economists call a “high discount rate,” in which the prospect of current income outweighs considerations of future well-being.\textsuperscript{18} Resources that could be profitably renewed are instead exploited to the hilt now, and thus they are transformed into wasting assets. What is perhaps most tragic of all is that even well-intentioned people—people who know better and would like to do better—can hardly avoid the ruthlessly destructive logic of self interest.\textsuperscript{19}

III. SELF-INTEREST, POLITICS, NORMATIVITY: FROM GIVEN-NESS TO GIFT

We know in a general way what needs to be done about environmental resources that we want to use but also want to preserve: we need to devise some way whereby people can take some of the resource, but also leave some behind or contribute to restoration, confident that what is left will not be snatched by others but will instead be used as a replenishment stock.\textsuperscript{20} But how can we arrange this? Bentham’s successors have noticed the problem, but can they tell us how we might prevent the well-known tragedy? Can they tell us how to preserve these resources, like the oceans or the air or the habitats and stocks of wild things, that we cannot easily turn into private property?

\textsuperscript{17} The name comes from Garrett Hardin, \textit{The Tragedy of the Commons}, 162 SCIENCE 1243 (1968); the original modern analysis of this problem was Scott Gordon’s article on fishing, \textit{supra} note 15.


\textsuperscript{20} Cf. Elinor Ostrom, \textit{ Governing the Commons: The Evolution of Institutions for Collective Action} 30-33 (1990) (arguing that restraining appropriation from a common pool resource should be analyzed separately from securing contribution to common-pool outputs).
Well, yes and no. One standard answer is to turn the great commons into a kind of great big property, usually owned by a government. When governments become the unified owners of these great resources, they will supposedly maximize the value of the commons by restraining individual use to amounts whereby the resources can restore themselves at their value-maximizing levels.\textsuperscript{21}

Unfortunately, this is not a smooth or costless enterprise. A variety of regulatory strategies exist to restrain individual use, but these strategies are costly to institute and police—and ever more costly as we need to exercise more and more control to preserve environmental resources like clean air or water or currently undeveloped land.\textsuperscript{22} In addition, environmental controls may involve highly technical decisions that are beyond most people's grasp. We may have to hire expensive experts to make these decisions for us, and we do not really know which experts to believe, if any.\textsuperscript{23} Then too, if environmental controls succeed in restraining individual use, they will make environmental goods harder to obtain, and this is bound to be reflected in the higher prices of any products that contain them. The increased prices of, for example, porpoise-protective tuna fish or environmentally safe paper products may create strong incentives to cheat, both on the part of producers of fish products and paper and on the part of those who buy these products.\textsuperscript{24} The problem of policing cheaters then adds even more to the cost of environmental controls. Many people may not

\textsuperscript{21} Id. at 8-9 (discussing governmental solutions, but rejecting arguments that they are the "only way" to solve commons problems).


\textsuperscript{23} OPHULS, supra note 13, at 157-59; see also Clayton P. Gillette & James E. Krier, \textit{The Un-Easy Case for Technological Optimism}, 84 MICH. L. REV. 405, 422-27 (1985) (technological decisions are essentially political and are subject to the flaws of the political process); Howard Latin, \textit{Good Science, Bad Regulation and Toxic Risk Assessment}, 5 YALE J. ON REG. 89, 91-94 (1988) (regulatory decisions are necessarily based on incomplete science, but may give illusion of accuracy, thus reducing political accountability).

care enough to pay the price, here and now, for environmental protection that is only noticeable later and maybe someplace else, even though the wider and longer-term costs of degradation may be much higher.

Finally, even if many people are indeed willing to pay the price, regulation itself does not always run easily toward desired ends. Regulatory agencies themselves sometimes become the battlefields where the resource users vie to establish their dominance; in effect, the commons problem in resource use turns into a commons problem in access to the regulatory agencies. The tendency of democratic regulatory institutions may be that intensely interested groups dominate the regulatory commons, a tendency that is not likely to benefit the diffuse interests of environmental protection.

For these reasons, it may be thought that a democracy left to itself is incapable of the self-regulation that environmental well-being requires. The pessimistic view is that a thoroughgoing attention to the environment may require a Leviathan, or perhaps, as people used to joke about 18th century Prussia, that one-half the population be turned into an army to guard the other. A modern-dress hint of this is even implicit in the suggestion that the Environmental Protection Agency should be given the powers of a kind of super-agency, to whose decisions the other branches of government defer.

All this presents a quite unattractive set of options. In effect, because of the great difficulty of managing the large and diffuse commons of the environment, we could be left with a choice between environmental well-being and democracy. If we are to have


26. The classic in this literature is MANCUR OLSEN, THE LOGIC OF COLLECTIVE ACTION (1965); see also Gillette & Krier, supra note 22, at 424 (contending that large groups with diffuse interests such as pollution control are disadvantaged in legislative action vis-a-vis more concentrated groups acting to avoid costs).

27. OPHULS, supra note 14, at 162-63.

28. See Bruce Ackerman & William Hassler, Beyond the New Deal: Coal and the Clean Air Act, 89 YALE L. J. 1466, 1471-72 (1980) (suggesting that agency should be insulated from political and judicial intervention).
environmental good things and democracy at the same time, we need to exercise some self-restraint. This point, incidentally, would have been no great secret to the founders of the republic, who were interested both in Adam Smith's free-market economics and in the notions of republican virtue. In a sense, environmentalism is only a particularly pointed example of a recurring problem in free and democratic governments: the importance of self-imposed citizen restraints for the sake of a common good.

Recent work in political economy has brought us back to this issue, suggesting that a system of norms and conventions may enable us to overcome some commons problems at relatively low perceived costs. The chief problem of the commons is that individually rational strategies undermine a collective good. The individually rational strategy of cheating while others cooperate leads everyone to cheat, and can decimate the things that would make us collectively better off.

But if we suppose that most people value the opinions of others, and if we suppose that most people are perceived to have a good opinion of behavior that corresponds to some particular norms or conventional practices, then commons problems may be overcome relatively painlessly. Under those circumstances, individuals may follow a norm of self-restraint even at some personal cost, in order to gain and hold the approbation of their fellows. Thus, if environmental problems are commons problems, certain kinds of norms about the environment might be a way of lessening the very high costs of environmental protection. Environmental norms could permit us to take some modicum of a given


32. Pettit, supra note 31, at 742-45.
resource, while voluntarily restraining ourselves before we exhaust the underlying common resource.

It is at this point, of course, where the "given-ness" version of the environment arrives at a dead end. When we think about environmental resources as "just a given," we are regarding their use as normatively neutral, ethically up for grabs. And because we have no moral qualms about "givens," nothing except coercion will hold us back from grabbing all we can. The problem, of course, is that it may be very costly to institute the coercion necessary to restrain environmental grabbing. It is technically costly because of the high price of monitoring and policing those who cheat, and politically costly because of the sacrifice of free action and democratic decision making. If we are to have less costly methods, we will have to rely on voluntary self-restraint; but voluntary self-restraint depends on norms.

Even on a quite hard-nosed, cost-benefit analysis of environmental issues, some consideration of environmental norms or ethics thus may become an urgent matter. The vision of the environment as a "given" may need some help here from that other vision of the environment, the vision that sees the environment as a "gift."

Does the "gift" vision help? Well, once again, yes and no. There is scarcely any question that the idea of gift may contain a strong normative element. We get a sense of this kind of gift-norm from a book, *The Gift Relationship*33, written several years ago by the rather renegade economist, Richard Titmuss. Titmuss made a study of what he saw as a purely altruistic act: the donation of blood. Titmuss noted that voluntarily donated blood was viewed with greater respect by those responsible for its use because voluntary donors were more likely to be truthful about their health and their blood was usually pure.34 Commercially collected blood, in contrast, was viewed as being more likely to be tainted, because concealment of impurity was in the seller's interest.35 That first heedlessness often rippled through later transactions, leading

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34. Id. at 144, 151.
35. Id. at 146-48, 240-241.
to further callousness, spoilage and waste. In a larger sense, Titmuss's work suggested that all gifts may be approached with a special kind of care and respect, and it is in this sense that the vision of the environment-as-gift might help to supply some norms of self-restraint in the use of commons—using the gift, to be sure, but having enough respect not to waste or pollute it.

With respect to the environment, the gift-vision has a certain spiritual quality. The spiritualism of the “gift” underlies some of the strongest impulses of modern environmentalism, most notably the aesthetic sensibilities so strongly stirred by Ansel Adams’s haunting photographs of Yosemite or John Muir’s deeply sensitive depictions of his wilderness travels. In our laws, too, we see a certain effort to recognize spiritual values, most notably in our laws about wilderness and wild creatures. For example, the Endangered Species Act, the Marine Mammal Protection Act, and the National Wild and Scenic Rivers Act have sometimes been discussed in the language of utilitarian preservation of a diverse gene pool; but they still seem to be animated by a much more emotional sense of the “gift” of our wild areas, and a sympathetic concern for their loss.

The problem is that in the environmental context, this vision of nature-as-gift may be too strong to be an appropriate norm of restraint. The spiritual overtone of the gift may make this vision incompatible with even a restrained rational use of resources. No doubt this spiritualism can be a useful antidote to the narrow self-interest that leads us to the well-known tragedy of the commons in our use of environmental resources. But as a day-to-day matter, the rhetoric of environment-as-gift may take us too far in the direction of restraint. What we need is not a complete hands-off

36. Id. at 240-41, 245-46.
41. As the Wilderness Act of 1964 puts it, the effort is to protect those places “where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain.” 16 U.S.C. § 1131(c)(1988). See also Doremus, supra note 40, at 271-75, 279-81 (making aesthetic and ethical arguments for biodiversity).
attitude, but rather a norm of use-with-restraint. Thus if the rhetoric of "given-ness" makes us normatively insensitive, we might have to worry that the rhetoric of "gift" makes us normatively oversensitive.

It is instructive, however, that Titmuss's work on the rhetoric of gift struck a middle ground—that is, use of gift resources, but use with care and respect. Can we generate similar environmental norms through the vision of environmental goods as gifts? Are any such norms appropriate for the dilemma of the late twentieth century, where common resources are under increasing pressure, and where we need an ethic to help us take some, but leave the rest?

The next part of this article will deal with that question, and will run through three possible ethics of environment-as-gift: the environmental norms of indigenous peoples; the environmental norms of rights and of the categorical imperative; and finally, though perhaps unexpectedly, the environmental norms of property, but with a focus on common property. This threesome by no means exhausts the list of environmental norms, a list that has grown explosively over the last generation; but these three vantage points do exemplify some of the features of a number of others in environmental ethics, and thus may be taken as to some degree representative.

I also want to emphasize that I am going to be speaking of these norms not on their intrinsic merits, but in a way that might be thought of as instrumental. The inquiry focuses on the kinds of norms that will help solve a commons problem, where we want to find ways to use resources, but in moderation, so as to avoid an overuse that might ruin otherwise renewable resources. This approach assumes that people do have some normative impulses, but that they also have choices about which norms to adopt.

42. For an historical overview, see Roderick F. Nash, The Rights of Nature: A History of Environmental Ethics (1989); for an introduction to some to the quite varied contemporary literature in this area, see Joseph R. DesJardins, Environmental Ethics: An Introduction to Environmental Philosophy (1993).

43. This is implicit in some scholarship on preference formation, e.g., Cass R. Sunstein, Legal Interference with Private Preferences, 53 U. Chi. L. Rev. 1129 (1986) (describing a variety of scenarios in which preferences and systems may be altered by intentional action).
and that people do wish to save common resources of all sorts from premature decimation. Hence my view of norms is instrumental in one sense, but in another sense serves a meta-norm of working together for common ends.44

IV. THREE SOURCES OF ENVIRONMENTAL ETHICS

A. The Environmentalism of Indigenous Peoples

It is probably no accident that modern environmentalism has coincided with a resurgent interest in the environmental practices of indigenous peoples, notably hunters and gatherers. There is something enormously attractive about the emphatically reiterated respect that these cultures show for wildlife and untrammelled nature, illustrated by their statements of kinship with particular animals and plants, and by their stories and pictures and names of particular parts of the wild.45 Some of these indigenous attitudes appear to be extremely widespread over the globe, suggesting that hunter-gatherers may generate certain kinds of norms of respect, no matter where they are.

One widespread view of wildlife among indigenous peoples directly relates to the perception of nature as a gift. Indigenous people from areas as widely separated as Canada and New Guinea state variants on this theme, including the view that animals give themselves to the hunters. This means that the animals' spirits themselves control the catch.46 The reason that fish or game be-


45. See, e.g., Arthur McEvoy, The Fisherman's Problem: Ecology and Law in the California Fisheries 1850-1980 36-38 (1986) (describing Indian fishing ceremonies and legends that animals and trees were ancestors); E. S. Craighill Handy & Mary Kawena Pukui, The Polynesian Family System in Kā'ū, Hawai'i 37-39 (detailing the tradition of aumakua among native Hawaiians—i.e. particular sharks, other animals, and plants embody the spirit of a guardian or relative).

46. See, e.g., McEvoy, supra note 45, at 36; Robert A. Brightman, Conservation and Resource Depletion: The Case of the Boreal Forest Algonquians, in McCay & Acheson, supra note 15, at 121, 137 (suggesting that animal spirits control the hunt).
come scarce, say these peoples, is that the animals have decided to conceal themselves and refuse any longer to give themselves up; it is the animals' decision and action that matters, rather than the hunters'.

Any other view suggests disrespect for the animals—disrespect that of course will displease the animals and make them hide all the more.

This set of beliefs, however, suggests why indigenous peoples' environmental norms may not be appropriate for our own environmental difficulties. Their respect for the animals may be so great as to divert indigenous peoples from their own activities as hunters. Among certain Native American fishing groups, for example, naturalists could not convince anyone that it was appropriate to count the fish. Counting, it was thought, would show disrespect for the fish. It need hardly be said that counting and taking inventory are fundamental tools of management, because without these basic measures, we will not be able to assess the effects of our actions.

Indigenous peoples do in fact manage resources quite extensively. Their practices, however, are not necessarily conservationist, and are thought to have contributed to numerous species' extinctions in prehistoric as well as more recent times. In any event, these practices may not be appropriate to modern conditions, where environmental resources are noticeably scarce. Some indigenous patterns no doubt stemmed from a flat and unsentimental disregard for the destruction of species, particularly the

47. Brightman, supra note 46, at 137, 139; James G. Carrier, Marine Tenure and Conservation in Papua New Guinea, in McCay & Acheson, supra note 15 at 142, 155-56 (poor catches due not to human acts but to fish learning to hide and to God's will).


49. See Brightman, supra note 46, at 137 (stressing the need for native hunters to redefine animal stocks as manageable).

large and dangerous ones that destroyed plantings or even hunted humans as prey. But some destructive practices seem to have stemmed directly from the ethic of viewing wildlife as a gift whose numbers and location were controlled by the animals' own decisions and not by human management. Early European frontier explorers reported that their Native American hosts seemed to go on an orgy of killing as they hunted, for example gratuitously destroying bird eggs. Among the hunters' explanations was the argument that they had to kill all the animals, lest the animals inform their fellows and hide. They also said that the wildlife reincarnated itself, and expressed an opinion repeated by indigenous hunters elsewhere as late as the 1960s: that when more were needed, more would be given. Indeed, the more the hunters killed, they said, the more the animals would give of themselves.

Less dramatic and less intentionally destructive resource management techniques also had their dangers. Fire has always been a major resource management tool among indigenous peoples. It controls undergrowth and enables young plants to grow for consumption by grazing wildlife, and coincidentally creates the conditions by which new trees may begin their own growth cycle. But we would not have needed the fires of Yellowstone to

51. Cowdrey, supra note 47 at 12-13; cf. Paul Greenough, Natuera Ferae: Historical Notes on the Management of Wild Animals in Colonial and Post-Colonial South Asia 17-20 (1991, draft on file with author) (noting that man-eating tigers in late 19th century India, saved from shooting by villagers' fears of retaliation by tiger spirits, were later killed indiscriminately with greater population pressure and the availability of weapons).

52. See Brightman, supra note 46, at 124, 131, 133; note also that indigenous hunters did not see the total availability of wildlife as subject to human manipulation. See, e.g. id. at 133; see also Carrier, supra note 47, at 162-56 (noting that Papua New Guinea natives do not believe human actions influence wildlife populations).

53. Brightman, supra note 46, at 130-31. Brightman cautions, however, that the writers of the period borrowed notoriously from each others' accounts, so that many reports might have had very few sources.

tell us that fire is a dangerous tool. Indian fires, too, often raged out of control.55

An even more important resource management practice among indigenous peoples is migration, which in a sense is a variant of the “pulse” hunting and fishing that is still observed among indigenous peoples: a pattern of seasonally intense but rotating harvests of a variety of resources.56 Migration is a part of this pattern, in which a group hunts intensively in a given area until it perceives that the wildlife has become scarce, a scarcity that is normally attributed to the animals’ own decision rather than to human hunting practices. When the group believes that wildlife is more abundant elsewhere, the members of the group move on.57

The practice of migration does indeed preserve the wildlife pool, if enough animals are left behind to regenerate.58 But it is a preservation technique that is compatible only with wide spaces or plentiful resources, where plants and animals have an opportunity to regenerate in a condition of non-use. Our own needs are different, even with respect to wildlife. We cannot move on, because there is often no place to move. If we want wildlife, we need to retain some portions of more or less wild habitat, even though the outlying areas are devoted to other uses.59 Needless to say, many indigenous hunter-gatherer peoples are now in the same position that the rest of us are in. They cannot move on either, since they are surrounded by peoples who use modern agricultural and manufacturing techniques—techniques that use the land much more intensely, and that have made wild areas too scarce for the indigenous practices of use-and-migrate. It should be no surprise that modern indigenous resource use patterns are

55. PYNE, supra note 54, at 79.
56. For an example of pulse fishing among Canadian Indians, see Berkes, supra note 45, at 81.
57. Brightman, supra note 46, at 129, 135; see also Richard Hames, Game Conservation of Efficient Hunting?, in McCay & Acheson, supra note 15, at 92, 98 (noting that Brazilian indigenous hunters hunt more distant areas when greater effort yields lower results nearby).
58. Townsend & Wilson, supra note 15, at 322-23 (noting a new theory of a “critical minimum” stock regeneration level). This appears to be compatible with a “pulse” harvest of wildlife—an intense but rotating harvest pattern—so long as rotation is timely.
59. See, e.g. DE ONIS, supra note 16, at 139, 197-98 (advocating “zoning” to retain rainforest ecosystems).
sometimes reduced to intensive harvesting, without the restorative component of migration or rotation. 60

Like indigenous periods, we ourselves face ever more limited wild areas and are subject to ever intensifying resource pressure. We need to regulate our own activities if we are going to preserve these wild areas. If norms are to help us to do that, they must be norms that direct our attention toward ourselves and the effects that our activities have on environmental resources. The indigenous peoples' respect for wild things, and their humility about the human role, may not carry us where we need to go—to a recognition that we ourselves are the problem, and to some conscious management of our own behavior. 61

And so the indigenous people's respect for the environment, despite its great attractiveness, can have a serious disadvantage. It may lead to a refusal to learn about our own impact on environmental resources. This traditional respect sometimes generates norms that are rooted in the bounty, rather than the scarcity, of environmental resources. But we certainly can learn something from these norms—notably an attitude of kinship with natural things, and a positive, generous, and respectful view of our relationship to the natural surroundings.

One thing we learn from indigenous peoples is that living in and from the wilderness makes one appreciate and respect it. By contrast, we should realize that a disregard of environmental resources may come from a lack of familiarity with or education about them. Even modern hunters are profoundly aware and appreciative of the habits and characteristics of wild animals, and

60. See McGoodwin, supra note 50, at 60-63 (describing instances in which, in face of growing scarcity, local fishing populations intensified fishing effort). For the modern efforts to preserve indigenous peoples and cultures by preserving large land areas, see Leslie A. Brownrigg, Native Cultures and Protected Areas: Management Options, in CULTURE AND CONSERVATION: THE HUMAN DIMENSION IN ENVIRONMENTAL PLANNING 33 (Jeffrey A. McNeely & David Pitt eds. 1985).

61. It should be noted, however, that some indigenous peoples have developed norms that effectively regulate their pressure on resources. See, e.g. McEvoy, supra note 45, at 29-31 (describing California Indian norms of population control, limited locational rights, and resource-preserving rituals); Brightman, supra note 46, at 138-39 (Cree alterations of norms of "respect" to include overhunting).
like it or not, hunters have traditionally been major contributors to a number of environmental causes. If more of us knew and experienced the wild, we might place greater value on wild things as well. Perhaps that is why some of our most influential environmental figures have been artists and writers; their representation of their own experience allows the rest of us to experience indirectly the things that their artistry presents to us, and hence we learn to value those things more. Among the modern gurus of environmentalism, Aldo Leopold seemed in some ways to adopt indigenous peoples' attitudes towards wild things, with his unsentimental interest in hunting and fishing, his close attention to the creatures on his Wisconsin farm, and his aesthetic narrative gift for conveying their behavior as sympathetic fellow members of a larger ecological community. Like the indigenous peoples who thought of themselves as interacting, communicating, and sympathizing with wildlife, Leopold's much-discussed "land ethic" is in many respects an ethic of kinship with a larger natural world.

B. The Norms of Biologic Rights

Western philosophic writers in recent years have developed a certain analog to indigenous cultures' respect for nature. That analog is expressed in the language of rights, notably animal rights, but also rights of other biologic specimens. Like indigenous peoples' cultural beliefs, the biologic rights approach suggests that animals and plants are or should be in control of their own destiny, and that human beings should control these creatures only insofar as the creatures consent—that is, insofar they give themselves to humans. Unlike the indigenous cultural viewpoint, however, in which the animals and plants are often quite generous, the rights approach suggests that this gift is a very rare event, and

62. For discussion of nineteenth century "sportsmen" hunters and wildlife reserves, see TOBER, supra note 6, at 49-52.
63. See John V. Krutilla, Conservation Reconsidered, 57 AM. ECON. REV. 777, 782 (1967) (noting that demand for wilderness resources may rise with greater experience & knowledge).
64. ALDO LEOPOLD, A SAND COUNTY ALMANAC (1949).
that it is only human presumption that has appropriated so many unwilling victims.

The underlying idea of the biologic rights approach is usually an extension of a loose Kantianism to the nonhuman world. Just as the Kantian ethicists envision human subjects as ends-in-themselves who are not to be treated as mere instruments or means in other peoples' projects, biologic rights adherents envision animals and even plants as subjects unto themselves, not to be treated as mere instruments of human will.66

There has been a very considerable interest in this approach in recent years, although the approach is beset with some characteristic conundrums. One set of difficulties, for example, revolves around such problems as the natural propensity of wild animals and plants to use each other instrumentally, notably as prey.67 Critics question why humans should be different, particularly when we are faced with biota that are particularly destructive to us, like viruses. To be sure, not all animal rights advocates take the position that viruses have rights, although some do.68 But if not all animals have rights, the issue shifts to the matter of defining the characteristic that makes any given animal a rights-bearer.69 Is that characteristic consciousness?70 Is it the ability to suffer?71 Or is it something else?

66. See DES JARDINS, supra note 42, at 126-28. The animal liberation thinkers who stress avoidance of animal suffering, however, are a variant on these, insofar as they use interest-based rather than rights-based justifications. See, e.g. Peter Singer's position, discussed in DES JARDIN, supra note 42, at 124.

67. CALVICO, supra note 65, at 44-45 (discussing animal rights and environmental ethics advocate Tom Regan).

68. See NASH, supra note 42, at 95 (describing writings defending hostile life-forms like smallpox virus).

69. Id. at 124-25 (issue of moral eligibility); see also DES JARDINS, supra note 42, at 130-31.


Although these questions of internal logic are interesting, my concern here is the function of these norms as paths to a metanorm of commons management. This more instrumental approach inquires about what seems to be the helpful or problematic aspects of the biologic rights approach: how well can this ethic help to support or advance a culture that combines use with care for common resources?

From this perspective, the main difficulty with the biologic rights approach is that, as the constitutional rights scholars say, the approach is at once underinclusive and overinclusive. As to underinclusiveness, biologic rights theories generally raise analytic questions about the ground for seeing biota as rights-bearing subjects-in-themselves, and this often leads the discussion to issues of consciousness, purposiveness, or other matters of subjectivity that might lend autonomous value to the subject. This effort to identify rights-bearing characteristics is in some ways a narrowing enterprise, and generally speaking, Western biologic rights theories lack the easy anthromorphism of indigenous normative patterns, which can attribute characteristics of kinship or enmity to almost any feature of nature. By contrast to indigenous inclusiveness, the biologic rights debates tend to include rather little of the natural world. One can easily attribute consciousness or some other datum of subjectivity to a dog or perhaps even a lobster. But it is much harder to do so for vegetation, not to speak of clouds, rocks and other non-biologic elements of the environment. That, in turn, means that the biologic rights approach extends only to a segment, and not necessarily to a large segment, of the greater environment.

As to the overinclusiveness problem, the biologic rights approach usually focuses on individual animals or biologic samples, rather than whole species, and would protect those individuals from any use or management. But what is needed for the protection of species and ecosystems are norms that will help us to use the good things of nature in moderation. This sometimes does involve management, and may even require the sacrifice of individuals for the sake of protecting the larger species. Weaker or diseased animals, for example, may be culled to strengthen a whole herd. While especially hardy species, particularly exotics,

72. See Des Jardins, supra note 42, at 131.
may have to be controlled in order to preserve native plants and animals.\textsuperscript{73} Predator species like wolves used to do some culling work, as implied in the Eskimo saying that the wolves strengthen the caribou herd.\textsuperscript{74} But in a modern setting where wolves and other natural predators are in short supply, we may have to do the controlling ourselves. The biologic rights approach normally rejects this kind of management, and does so quite sharply; indeed, biologic rights proponents have referred to this idea—sacrificing the individual for the sake of a larger community—as environmental fascism.\textsuperscript{75} But the cost of such careful attention to individuals may be a weakening of the larger wild pool.

To be fair to the biologic rights approach, it was never really motivated as much by a concern for commons management as by a concern about cruelty. In the context of commons management, however, the biologic rights approach magnifies the problems of the respect-norm found in indigenous cultures. An enlarged respect for biologic subjects may lead us to do things, or refrain from doing things, to such a point that larger species and whole ecosystems may be destroyed.

What can be gained from the biologic rights approach? One way to see the approach is as a metaphor, and as a kind of a wake-up call about the autonomous value of nature, the approach clearly does have some value for the management of an environmental commons. Some may not find the biologic rights approach very attractive aesthetically. Unlike the indigenous cultures' stress on kinship and generosity, the biologic rights approach sometimes

\textsuperscript{73} For an example, see, e.g., Palilla v. Hawaii Dept. of Land and Natural Resources, 471 F.Supp. 985 (D. Hawaii 1979), aff'd, 639 F.2d 495 (9th Cir. 1981) (state wildlife agency required to destroy feral sheep and goats, so as to avoid destruction of critical habitat of an endangered bird species). Similarly, in the plant domain, cattails and exotics need to be suppressed in the Everglades if native vegetation is to survive. See Can the River of Grass Flow Again, The Economist, Jan 5, 1991, at 25. For a discussion of a variety of exotic plants and animals threatening native species, see Mark A. Stein, Natives Crowded Out: Species that Run Amok, L.A. Times, Feb. 22, 1989, at 1. See also Des Jardins, supra note 39, at 132-33. But see Kyla Seligsohn-Bennett, Mismanaging Endangered and "Exotic" Species in the National Parks, 20 Envtl. L. 415 (1990) (disputing definitions and management of "exotic" species).

\textsuperscript{74} Farley Mowatt, Never Cry Wolf 89-90 (1963).

\textsuperscript{75} See Tom Regan, Holism as Environmental Fascism, in CONTEMPORARY MORAL PROBLEMS 291-92 (James E. White ed., 1985).
seems to suggest a rather cramped focus on entitlement, which in turn suggests segregation and estrangement among species, a condition in which gifts are rarely made across species lines. On the other hand, the metaphor of rights, like the perspectives of indigenous cultures, stresses that natural resources are worthy of respect—that nature is full of creatures that we should treat with respect, and whose lives should not be entirely controlled by single-minded human wishes and propensities. Moreover, the metaphor of rights carries its message in a vessel that is well-known in western thinking. As with disquisitions about the rights of children and the mentally incompetent, the rights-talk of animal and plant life may be a way of awakening some people to the notion that natural surroundings should be taken seriously.

A second contribution of the biologic rights approach, although contrary to the wishes of some of the rights theorists, is to suggest the extension of some version of a rights rhetoric to whole ecosystems. This is quite clearly a metaphoric use of the rhetoric of rights, and it entails a radical divergence from the individual-centered entitlements about which rights are normally concerned. The language of "ecosystem rights" instead suggests that individual plants or animals might have to be sacrificed for the larger system that bears the metaphoric "right."

76. See Callcott, supra note 65, at 33-34 (contrasting legalism of animal-rights, with tribal peoples' attitude of respect, appreciation and acceptance of danger and hardship vis-a-vis animals). See also Peter Singer's fastidiousness in making sure that people knew he was not concerned out of fondness for animals. Singer, supra note 71, at i-iii, ix, x, xi (explaining that he is not particularly fond of animals, and that moral concern for animals has nothing to do with such sentiments).


78. See Nash, supra note 42, at 164-69; cf. Stone, Earth and Other Ethics, supra note 77, at 107-108, 220-26 (seeing natural systems as having moral considerability, if not rights).
On the other hand, this rhetoric functions precisely as a shift of attention away from the legal entitlements of individual animals or plants, refocussing on the "rightness" of their nature in the Aristotelian sense in which things are defined by their telos or best nature. What is the right way for an elephant or tree to be? Or for that matter, what is the right way for the clouds, the ozone layer, or an entire ecosystem to be? What is the inherent and best nature of these things, such that adherence to that nature is a kind of health, and deviation is an illness? And what does this teleologic nature suggest for our dealings with such things and our life among them?

This is of course a very old approach both to ethics and to natural phenomena. Among modern writers in an environmental genre, one sees the approach, even outside the rights language, in the work of people like Wendell Berry, or once again, Aldo Leopold. Leopold's "land ethic" focussed expressly on what he thought was the well-being of biotic communities, especially wild ones. Berry, on the other hand, is a farmer, albeit a curmudgeonly one, concerned with domesticated animals and with the right ways of farming. But like the group of writers known as ecofeminists, Berry and Leopold seem intent not on conquering nature, but on sympathetically exploring, understanding, and working with the best "natures" of the ecological systems around them. What those natures are, or whether there is a single such nature for any ecosystem, is a subject of debate. But the debate

79. See, e.g. DES JARDINS, supra note 42, at 151 (referring to Aristotle); CALLICOTT, supra note 65, at 28-29 (referring to Plato).
80. LEOPOLD, supra note 64, at 212, 220-25.
81. See, e.g. WENDELL BERRY, WHAT ARE PEOPLE FOR? 114-16 (1990) (stressing need for particular and sympathetic knowledge of places, animals). Leopold was also a farmer in a sense; his Sand County Almanac was written in large part about the creatures on his farm, though it had run more or less wild. LEOPOLD, supra note 64.
82. For ecofeminism, see DES JARDINS, supra note 42, at 239-41, 249-58. Though there are a number of strands of this line of thinking, many link environmental problems with an effort to dominate both women and nature in the Western rationalist tradition. See, e.g. CAROLYN MERCHANT, THE DEATH OF NATURE 185-90 (1985) (discussing the mechanistic, anti-holistic, antifeminist character of Baconian approach to science, in contrast to earlier organic approach). The overlap with Berry's views is all the more interesting in light of some of Berry's tangles with feminism on other fronts. See BERRY, supra note 81, at 178 (responding to critics who accused him of exploiting his wife as a typist).
83. See DANIEL BOTKIN, GLOBAL WARMING AND FORESTS OF THE GREAT LAKES
itself is a means by which an ethical position—concerned with the health of natural communities—opens up a substantive discussion of just what “commons” resources are important and why they are important. This metaphor of ecological rights is also an ethic not of domination, but of concern for the larger surroundings, taken as wholes in all their complex interactions. In that sense, a rights-ethic might resemble the ethic of respect that indigenous peoples have for their surroundings.

C. Nature’s Gift as Common Property

Although environmental good things seem to defy the idea of property, there is a striking amount of property language in modern environmentalism. Even the notion of gift is a property concept, and there are a good many more property metaphors in environmental discussions. Take for example the slogan that appears from time to time in environmental campaigns: the environment is not something we inherit from our ancestors, it is said, but something we borrow from our children.84 Or the words of Marjorie Kinnan Rawlings about a special place, Cross Creek:

It seems to me that the earth may be borrowed but not bought. It may be used, but not owned. It gives itself in response to love and tending, offers its flowering and fruiting. But we are tenants and not possessors, lovers and not masters. Cross Creek belongs to the wind and the rain, to the sun and the seasons, to the cosmic secrecy of seed and beyond all, to time.85

84. See, e.g. George DeWan, Endangered Species, NEWSDAY, April 7, 1993, at 21 (quoting Secretary of the Interior Bruce Babbitt); Susan Tompor, Dow Wants to be Known as Environmentalist Firm, GANNETT NEWS SERVICE, May 1, 1990 (quoting Dow Chemical’s 1990 Annual Report). The provenance of this cite seems to be a bit obscure. President George Bush cited two different sources. See Remarks, FEDERAL NEWS SERVICE, Nov. 18, 1991 (attributing saying to Theodore Roosevelt); and Celebrating the Earth, special to the WASHING­TON TIMES, Apr. 20, 1990, at H 1 (attributing same to Native Americans). Another member of the Bush administration evidently had other ideas: see Secretary of State James Baker Addresses the National Governors’ Association, FEDERAL NEWS SERVICE, Feb. 26, 1990 (attributing same to Emerson).

85. Marjorie K. Rawlings, CROSS CREEK 368 (1942), quoted in Charles L.
Much more prosaically, the National Environmental Policy Act uses another trope from property, that of trusteeship and the obligations among generations.86

These typical metaphors have some common elements. First is the notion that resources are shared, and that the holders of resources have some usufruct of these resources rather than exclusive ownership. Second, they include a notion that this shared usufruct is temporary to any given holder, a tenancy to be held over time and then relinquished to the next holder. Third is the notion that there is some core or center of the resource that is to be maintained in its integrity for the others who will become its tenants and use its fruits as well.

Those of us who teach property know that tenancy, trusteeship, and usufructory rights are all forms of ownership; but they are forms of shared ownership, often for limited periods, in which current users have responsibilities to others, especially others in the future. Current tenants may not “waste” the property—that is, they may take some of its product, but they may not do so in ways that are disproportionate, or in ways that would destroy the productive thing itself and its usefulness to later successors.87 Some quite similar notions appear in the law of trusts, in which ownership is split between legal holders and the beneficiaries of the trust property. The legal holder or “trustee” is generally supposed to devise ways to secure the income or product for the beneficiary, but also to behave prudently so as to preserve the core property that produces that income, the res of the trust.88

In recent years a number of somewhat truculent commentators have criticized what they consider the merely alleged “tragedy of the commons,” noting that there are many successful examples of common property. In these examples, the holders have devised quite sophisticated devices for permitting limited individual uses of common property—uses that, taken together, do not destroy but rather tend to preserve the whole.89 These devices are typi-

89. See, e.g., Susan Jane Buck Cox, No Tragedy of the Commons, 7 ENVTL
cally enforced by customs and norms. Fishing norms are a common example, as are agricultural practices such as the very widespread and long-lived practice of "stinting" the livestock that any individual peasant may allow to roam on a common field. 90

These common-property arrangements have been used to manage a great variety of resources. Common law courts have often adopted the customary patterns through which people regulate their own behavior, and the common law thus often reflects these common-property practices. 91 During the years in which our own great Eastern rivers were used for water power, for example, owners of mills were expected to use the streamflow "reasonably." 92 While they could drive their mills with the power of the river waters, they were expected to do so in such a way as to preserve the bulk of the water volume as it flowed past successive mills on the way to the sea. 93

Thus, some of Bentham's successors may have been thinking about property too narrowly, as individual property exclusively at the disposal of the individual owner. That is only one of our forms of property, and while it is important, forms of common property are important as well. 94 There are great bodies of law about common property, and they revolve around an ethic of moderation, proportionality, prudence, and responsibility to the others who are entitled to share in the common resource. Indeed, even individual property revolves around these normative characteristics. The individual property-holder relies in great part on the recognition

ETHICS 49 (1985); David Feeny et al., The Tragedy of the Commons: Twenty-two Years Later 18 HUMAN ECOLOGY 1 (1990); see generally ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990).

90. See Feeny, supra note 89, at 10, and sources cited therein.
and acquiescence of others,\textsuperscript{95} and individual property law assumes a large measure of neighborliness and attentiveness to the needs of others in the use of one's own "exclusive" property.\textsuperscript{96}

Property thus includes a normative "deep structure" that may be of use in an environmental ethic. The norms that lurk in property go beyond the wondrous power of exclusion that so awed Blackstone in the case of individual property.\textsuperscript{97} They include as well the qualities of restraint and responsibility that characterize common or shared property. Property law is most visible when it deals with breakdowns of these norms of restraint and responsibility, but on the whole, property law assumes that these norms do exist and predominate in our behavior. Hence, it is no accident that environmental metaphors are often metaphors of property—shared tenancy, trusteeship, stewardship, and even gift.

Modern environmentalism needs to build on the normative metaphors of property. Of late, there has been a considerable attentiveness to ways property devices might be used to control environmental resources, including everything from abating air pollution by creating tradeable emission rights for electrical utilities\textsuperscript{98} to conserving rain forests by recognizing local countries' property rights in the forests' wild genetic resources.\textsuperscript{99} A substantial portion of the environmental community has resisted such forays into property concepts, perhaps because they are presented as appeals to self-interest, and involve the classical economic move of harnessing private interest to the general wealth.\textsuperscript{100}

\textsuperscript{95} See Rose, supra note 12, at 81-85.
\textsuperscript{96} See, e.g. Rose, supra note 88, at 744-45 (discussing rules of moderate public use of private property). Nuisance law, of course, also builds in "reasonable" overlaps among neighbors' uses.
\textsuperscript{97} 2 WILLIAM BLACKSTONE, COMMENTARIES *2.
\textsuperscript{100} See, e.g., Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837 (1984) (approving "bubble" policy, an early version of property-type efforts, opposed by a major environmental group); Martin Bern, Government Regulation and the Development of Environmental Ethics Under the Clean Air Act, 17 ECOL. L. Q. 539, 554-55 (1990) (arguing that economics-based thinking is antithetical to ethical values); Mark Sagoff, The Economy of the Earth: Philosophy, Law and the Environment 77-81 (1988). Sagoff appears to be ambivalent, however, insofar as he does accept tradeable emission rights. See
The appeal to self-interest is indeed a significant aspect of these property devices, but it is important to observe that there are other normative opportunities in these property-based devices. The rhetoric of property can easily encompass appeals to thrift and carefulness, attentiveness to overuse, and maintenance of a common stock. These normative appeals can apply to new forms environmental property as well. To be sure, an important facet of such devices as transferable emission permits, for example, is that an individual factory may buy and use such pollution entitlements at will. But an even more important aspect of these permits is that they constitute a very restrained entitlement, allowing the consumption of only a very limited portion of a larger common property, that is, a common property in the air itself. These devices are the modern equivalent of the individual peasant’s stint of livestock on the common fields. The peasant indeed had his individual entitlement, but he had to use it carefully and with due regard to the preservation of the larger commonly-held resource. The same may be said of the modern factory’s entitlement to consume a small modicum of clean air, while leaving the bulk untouched as a renewable stock.

To be sure, it may be objected that the real frisson of the wild is somehow not caught in these overly tame metaphors of property, metaphors that smack too much of the garden and the zoo, and too little of the crashing surf, the boiling clouds, and the untrammelled, leaping mountain lion. Edward Abbey no doubt helped to sharpen the divide between controlled property and uncontrolled wildness by observing that the wilderness is “only a place where one enjoys the opportunity of being attacked by a dangerous wild animal.”

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It is true that the normative focus of a property ethic is largely anthropocentric, concentrating on the duties, practices, and claims of people, now and in the future. Indeed, there is not really much choice about this. Given the impact of human beings on natural resources, everything “out there” in some sense must be managed as a zoo or a garden. Nowadays, like it or not, even a decision to do nothing represents a human option and a version of human management.

Does this mean that property conceptions squeeze out all the allure of uncontrolled wildness? Well, not always. Even in the most tame, the most human-centered realms of property, one often catches a glimpse of wildness. Every gardener knows that shrubbery has a mind of its own, and even the beekeeper knows that her honeybees are wild animals who choose to occupy her hives.\textsuperscript{102} These fleeting observations suggest that the anthropocentrism of property is quite compatible with a kind of stubborn assertiveness in what we anthropocentrically refer to as “resources.” However dim our vision, we all understand that plastic trees are not the same as real ones.\textsuperscript{103} While other writers have given other reasons for the distinction, one real possibility is that plastic trees are somehow too tame, too infinitely malleable, and hence utterly incapable of interaction. Plastic trees won’t talk back.\textsuperscript{104} But a real tree will talk back, even in a garden. It too has its own elusive wild streak.

All this suggests a certain wildness even within property. And on the other side of the coin, even the absence of property does not necessarily mean complete wildness. People who live in what we think of as “the wild” may not see it as wild at all. As one American Indian remarked, “We did not think of the great open plains, the beautiful rolling hills, and winding streams with tangled

\textsuperscript{102} See SUE HUBBELL, A BOOK OF BEES . . . AND HOW TO KEEP THEM 110 (1988).

\textsuperscript{103} See Tribe, supra note 44, at 1347; Daniel A. Farber, From Plastic Trees to Arrow’s Theorem, 1986 ILL. L. REV. 337, 345.

\textsuperscript{104} HOLMES ROLSTON, III, ENVIRONMENTAL ETHICS: DUTIES TO AND VALUES IN THE NATURAL WORLD, 22-23 (1988) (discussing the “dialectical value” of wild things); see also Farber, supra note 103, at 345 (compares plastic trees to human-like robot).
growth, as 'wild.' . . . To us it was tame."105 The West, though unowned as property, was tame to those who knew its ways.

These considerations suggest a certain breakdown in the categories of tame and wild, and suggest that a modern environmental ethic of property may benefit from the blurring of these categories. We may see wildness even in the things we seem to have turned into property; we may combine awe and respect for these things with carefulness and moderation.

We can use the concepts of property, and especially common property, to derive norms of responsibility and carefulness about a shared trust that we want to last. Property concepts do indeed make us understand ourselves to be the gardeners and zookeepers of what we call the wilderness, but they are also compatible with an understanding that the resources of the great commons are not simply "givens" that can be completely tamed and turned to our pleasure. The qualities of the rain and the soil, the majesty of the beasts and the mountains—these are qualities that most people value in thinking of the environment. Property rhetoric can treat these good things as gifts that people should hand along intact, precisely because people have some feel for their otherness as well as for their responsiveness to human management.106 That combination of respect for the thing itself, together with care for other users, is what it means to have a "gift" that comes to us from beyond our control—a gift that we pass along as yet another gift to those who follow.


106. Cf. BERRY, supra note 81, at 98-99 (asserting that earthly things to be treated with care as gifts from God that are infused with God's spirit).